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No. 02-1348 (5)

IN THE

Supreme Court of the United States

OLYMPIC AIRWAYS,

Petitioner,

v.

RUBINA HUSAIN, individually and as personal representative of the estate of Abid M. Hanson, M.D., HANNAH HUSAIN, SARAH HUSAIN, ISAAC HUSAIN, by and through their guardian ad litem RUBINA HUSAIN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

The Warsaw Convention provides the exclusive basis for an air carrier's liability in any action seeking to recover damages for bodily injury or death in international air transportation. The question presented in this case is:

Whether the Warsaw Convention, which imposes air carrier liability only where an "accident" causes passenger death or injury, applies when a passenger's pre-existing medical condition is aggravated by exposure to a normal condition in the aircraft cabin, even if the carrier's negligence was a link in the chain of causation?

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RUBINA HUSAIN, individually and as personal representative of the estate of Abid M. Hanson, M.D., HANNAH HUSAIN, SARAH HUSAIN, ISAAC HUSAIN, by and through their guardian ad litem, RUBINA HUSAIN,

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Air Transport Association of America, Inc. ("ATA"), as *amicus curiae*, supports the position of Petitioner Olympic Airways urging reversal of the decision of the United States Court of Appeals for the Ninth Circuit.[1]

[1] No party to this case had any role in drafting this brief, or provided any monetary support for its preparation or filing. *See* Supreme Court Rule 37.6. The ATA is filing this brief with the consent of both Petitioner and Respondents. Those consents have been filed with the Court.

INTEREST OF *AMICUS CURIAE* AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

The ATA is an association of 22 U.S. and five foreign airlines.[2] The ATA's U.S. members operate within the United States and in the U.S. foreign commerce. Its foreign members also participate in the U.S. foreign commerce and are subject to suit in the United States. A principal purpose of the ATA is to support its member airlines by promoting airline safety and advocating common industry positions on important policy and legal issues. Since its inception in 1936, the ATA has been involved in the development of international law governing international air transportation.

The decision below threatens to upset the established expectations of air carriers and governments about the operation of the treaty-based liability regime governing international air transportation, commonly known as the Warsaw Convention.[3] The decision below improperly

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[2] The ATA's member airlines are: Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, ATA Airlines (formerly American Trans Air), Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Forwarding, Evergreen International Airlines, FedEx Corporation, Hawaiian Airlines, JetBlue Airways, Midwest Airlines (formerly Midwest Express Airlines), Northwest Airlines, Polar Air Cargo, Southwest Airlines, United Airlines, United Parcel Service, and US Airways. Associate members are: AeroMéxico, Air Canada, Air Jamaica, KLM-Royal Dutch Airlines, and Mexicana de Aviación.

[3] In this brief, all references to articles of the Waresaw Convention are to the Convention as amended by Montreal Protocol No. 4, as it is currently in effect for the United States. The text of the amended Convention, as published by the U.S. Senate Foreign Relations Committee, appears in the Appendix to this brief. The international air carrier liability regime comprises three documents at this writing:

imposes common-law duty-based negligence principles on the definition of a compensable "accident" under Article 17 of the Warsaw Convention. It therefore undermines the uniformity and exclusivity of air carrier liability under the Convention that this Court's decision in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), requires, and contradicts the non-fault-based meaning of "accident," which this Court adopted in *Air France v. Saks*, 470 U.S. 392 (1985). The courts below incorrectly applied common law jurisprudence to this treaty-based legal regime by expanding the definition of "accident" in *Saks* beyond recognizable form. Contrary to the suggestion of the District Court, *Tseng* was not an instruction to the lower courts to expand *Saks*, *see Husain v. Olympic Airways*, 116 F. Supp. 2d 1121, 1135 n.11 (N.D. Cal. 2000), Petitioner's Appendix[4] at 58a n.11, and the ATA urges the Court to reverse the attempt of the lower courts to do so.

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(1) Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 40105 (note) (2000) (hereafter "Warsaw Convention" or "Convention"); (2) Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, done at The Hague, Sept. 28, 1955, S. Treaty Doc. 107-14; and (3) Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929 as amended by the Protocol done at The Hague on September 28, 1955, Sept. 25, 1975, *reprinted in* S. EXEC. REP. NO. 105-20, at 21-32 (1998) (hereafter "MP4"). The United States currently is party only to documents 1 and 3, the original Warsaw Convention and MP4. MP4 entered into force for the United States on March 4, 1999. The Hague Protocol has been resubmitted recently to the Senate for its advice and consent to ratification.

[4] Hereafter citations to the Appendix filed by Petitioner Olympic Airways are cited as "Pet. App. at ___."

STATEMENT OF THE CASE

This case addresses the liability of Olympic Airways for the death of its passenger, Dr. Abid M. Hanson, during an international flight from Athens, Greece to New York. Dr. Hanson's survivors allege that he died as a result of an asthma attack caused by exposure to cigarette smoke in the passenger cabin of the aircraft during the flight, which lawfully allowed smoking in designated places. *See Husain v. Olympic Airways*, 316 F.3d 829, 831-32 (9th Cir. 2002), Pet. App. at 3a.

The evidence at trial established that Dr. Hanson had a prior history of asthma and suffered from severe food allergies before his death. *See id.* at 832-33, Pet. App. at 4a-5a. At the airport, he or a family member requested that he be assigned a seat in the non-smoking section of the aircraft. *See id.* at 833, Pet. App. at 6a. Upon boarding the plane, Dr. Hanson and his family realized that he was assigned to a non-smoking row close to the smoking section, and his wife asked a flight attendant to reassign him to a non-smoking seat further away from the smoking section. *See id.* The flight attendant refused. Before the airplane took off, Dr. Hanson's wife asked again that he be moved to a different seat, but was rebuffed once again even though there were other non-smoking seats available. *See id.* at 833-34 n.5, Pet. App. at 6a-7a n.5.

Shortly after the airplane took off in Athens, passengers in the smoking section began to smoke, and the smoke began to bother Dr. Hanson. *See id.* at 834, Pet. App. at 7a. His wife again asked the same flight attendant to move him, but the attendant again refused to do so because the plane was full. *See id.* The flight attendant did grant Dr. Hanson's wife the option of asking other

passengers if they would switch seats with him. *See id.* Neither Dr. Hanson, his wife, nor any other of their several traveling companions ever used this option. *See Husain*, 116 F. Supp. 2d at 1126, Pet. App. at 40a. Later, assisted by a traveling companion who was an allergist, Dr. Hanson was given at least two shots of allergy medication, after which he collapsed and stopped breathing. *See id.* He was then given cardio-pulmonary resuscitation and oxygen. *See Husain*, 316 F.3d at 834, Pet. App. at 8a. Despite these efforts, Dr. Hanson died on the aircraft. *See id.*

Dr. Hanson's surviving family members filed this action against Olympic Airways in a California state court to recover damages resulting from his death. *See id.* at 832, Pet. App. at 3a. They alleged that Olympic Airways was liable for his death under the Warsaw Convention. Olympic Airways timely removed the action to the United States District Court for the Northern District of California. *See id.*

Following a three-day bench trial, the District Court issued its findings of fact and conclusions of law, and later made technical corrections to those findings. Pet. App. at 32a-80a (reported at 116 F. Supp. 2d 1121 (N.D. Cal. 2000)). The District Court recognized the binding precedent from this Court that the death of a passenger during international air transportation is compensable only if it is caused by an "accident." *See id.* at 1130, Pet. App. at 49a (citing *Saks*, 470 U.S. at 396). Although the District Court found that smoke exposure during the flight was a primary cause of Dr. Hanson's death, *see id.* at 1128, Pet. App. at 43a-44a, the court held that the flight attendant's failure to comply with his wife's requests to assign him to a different seat was an "accident" under Article 17 of the Warsaw Convention which proximately caused his death.

See id. at 1135, Pet. App. at 58a-60a. The District Court also found that the flight attendant's refusal to reassign Dr. Hanson to another non-smoking seat constituted "wilful misconduct" under Article 25 of the Warsaw Convention, thereby exposing the airline to unlimited liability.[5] *See id.* at 1139, Pet. App. at 67a. Following the issuance of supplemental findings of fact and conclusions of law, *see* Pet. App. at 23a-31a, Olympic Airways timely appealed to the United States Court of Appeals for the Ninth Circuit. *See Husain*, 316 F.3d at 832, Pet. App. at 4a.

The Court of Appeals affirmed the District Court's holding that Dr. Hanson's death was caused by an Article 17 "accident." Pet. App. at 1a-21a (reported at 316 F.3d 829 (9th Cir. 2002)). The court specifically found that the flight attendant's failure to move Dr. Hanson's seat violated Olympic Airways' procedures and was an "accident" under Article 17. *See id.* at 837, Pet. App. at 14a. In language reminiscent of the balancing test for a fault-based negligence standard developed by Judge Learned Hand,[6]

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[5] The ATA notes that its members have waived the limits of liability without the Article 25 finding of "wilful misconduct" required by the text of the Convention.

[6] See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947):

> [T]he owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.

Id.

the Court of Appeals explained that the "failure to act in the face of a known, serious risk satisfies the meaning of 'accident' within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane." *Id.*

Regarding causation, the Court of Appeals found that "the exposure to smoke and failure to move Dr. Hanson" was a sufficient "link in the chain" of causation to subject the airline to liability for his death. *Id.* at 838, Pet. App. at 16a-17a (quoting *Saks*, 470 U.S. at 406). The Court of Appeals also affirmed the District Court's finding that Dr. Hanson's death was proximately caused by the "wilful misconduct" of Olympic Airways under Article 25, stating that the flight attendant's "failure to take action, either by moving Dr. Hanson or by notifying [her supervisor] of [his wife's] request to have her husband moved, was willful misconduct." *Id.* at 840, Pet. App. at 19a.

Following the decision from the Court of Appeals, Olympic Airways timely petitioned for a writ of *certiorari* from this Court. The Court granted that petition on May 27, 2003.

SUMMARY OF ARGUMENT

The decisions of the courts below are at odds with the treaty-based liability regime governing international air transportation, commonly known as the Warsaw Convention. The ATA urges this Court to find as a matter of law that the Convention does not provide a remedy when a passenger's pre-existing medical condition is aggravated by exposure to a normal condition in the aircraft cabin, regardless of whether the air carrier failed to minimize or

prevent the aggravation of the passenger's pre-existing medical condition. Two reasons support reversal:

First, the airline's failure to assign Dr. Hanson a different seat did not cause his death; therefore, it cannot be the basis for liability under this Court's interpretation of Article 17 of the Warsaw Convention in *Saks*.

Second, and more fundamentally, by imposing common law negligence theories of liability on international air transportation, the decisions of the courts below contravene this Court's instruction in *Tseng* that the Warsaw Convention is the exclusive remedy for passengers injured during international air transportation. Allowing this decision to stand will contradict the Court's decision in *Tseng* and render it meaningless. Contrary to the suggestion by the District Court below, and affirmed by the Court of Appeals, *Tseng* was not an instruction to the lower courts to expand the *Saks* definition of "accident" by imposing onto it modern common law concepts of duty, foreseeability, and fault.

ARGUMENT

1. The Warsaw Convention establishes a comprehensive liability system for the compensation of passengers without regard to the fault of the airline. Many of the world's airlines, including ATA-member airlines, have waived their limits of liability and certain defenses.[7]

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[7] The Warsaw Convention authorizes airlines to agree to additional liabilities by "special contract." Warsaw Convention, art. 22. The U.S. Department of Transportation has approved the intercarrier agreement by which ATA-member airlines waived their liability limit for death of or bodily injury to passengers and waived the "all necessary measures" defense of Article 20 for claims up to a certain liability amount. *See* Docket No. OST-96-1607, Order 97-1-2, 1997 DOT Av. LEXIS 2 (D.O.T. Jan. 8, 1997). Major foreign air carriers have taken similar action.

As such, the Convention provides the exclusive basis for the claim of a passenger seeking a remedy from an airline for any personal injury or death occurring during international air transportation. *See Tseng*, 525 U.S. at 161. This Court has held specifically that "recovery for a personal injury suffered on board an aircraft or in the course of any of the operations of embarking or disembarking . . . if not allowed under the Convention is not available at all." *Id.* (internal quotations and alterations omitted).

In *Tseng*, the Court construed Article 17 of the Convention, which controls the imposition of liability for personal injury or death suffered by a passenger. *See id.* Article 17 provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, *if the accident which caused the damage so sustained* took place on board the aircraft or in the course of the operations of embarking or disembarking.[8]

Warsaw Convention, art. 17 (emphasis added).

Chapter III of the Warsaw Convention, in which Article 17 is found, imposes a specific and carefully constructed process for determining the liability of an air carrier to its passengers. A carrier is presumptively liable if a claim is

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[8] Quotations from the Warsaw Convention included in this brief are to the official English translation of the Convention. *See* 49 Stat. 3014-3023, *reprinted in* 49 U.S.C. § 40105 (note) (2002). The governing text of the Convention is written in French.

timely filed and the passenger can establish the three elements required by Article 17: (1) death or bodily injury, (2) caused by an accident, and (3) which occurred when the passenger was on board the aircraft, or embarking or disembarking from it. From this strong presumption of liability, the Convention confers on the carrier two limited defenses: the carrier can prove (1) that it took all necessary measures to avoid the damage or that it was impossible to take such measures (Article 20), or (2) that negligence of the passenger caused or contributed to the damage, such that the carrier may be exonerated wholly or partly from his liability (Article 21). In this way, the Convention confers on claimants the benefits of a presumption of liability once they show that an "accident" caused "death or bodily injury" while on board, or embarking or disembarking from, an aircraft. This aspect of the legal regime is a significant advantage to claimants. In return, carriers are given certain limits on their liability. And, as *Tseng* teaches, a carrier is not liable for personal injury if the Article 17 criteria cannot be established. Regardless of how cleverly the plaintiff describes or styles his claim, following *Saks* and *Tseng*, when the plaintiff does not allege or cannot prove that the passenger's injury or death resulted from an accident, a court errs in holding the airline liable for the passenger's injury or death.[9]

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[9] As the British House of Lords has aptly explained in foreshadowing this Court's decision in *Tseng*, "[t]o permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier." *Sidhu v. British Airways*, [1997] A.C. 430 (H.L. 1996).

The established definition of an "accident" under Article 17, which is now accepted world-wide,[10] comes from this Court's seminal 1985 decision in *Saks*. In *Saks*, this Court defined "accident" to be "an unexpected or unusual event or happening that is external to the passenger," and specifically limited the definition to exclude injury that "indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 405, 406.

This Court made clear in *Saks* that liability under Article 17 arises only if the "accident" *causes* the passenger's injury or death. *See id.* at 396. Under *Saks*, an "accident" is an event that occurs independently of the passenger. Explaining this definition, in *Saks*, the Court cited with approval the holdings of lower courts that the following incidents are not "accidents" within the meaning of the Convention: sitting in an airline seat during a normal flight, which aggravated a hernia despite the airline's failure to move the passenger's seat, *Abramson v. Japan Airlines Co.*, 739 F.2d 130 (3d Cir. 1984); fainting while waiting in the terminal for one's baggage, *MacDonald v. Air Can.*, 439 F.2d 1402 (1st Cir. 1971); and sitting in an airplane seat during a normal flight, which aggravated thrombophlebitis, *Scherer v. Pan Am. World Airways, Inc.*, 387 N.Y.S.2d 580 (N.Y. App. Div. 1976). *See Saks*, 470 U.S. at 404-05. Following *Saks*, courts have properly held that the following injuries have not been caused by an "accident": swollen legs from sitting in an airplane seat, *Toteja v. British Airways PLC*, No. JFM-99-815, 1999 WL 1425399 (D. Md. July 20, 1999); and a back injury from

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[10] *See, e.g., Morris v. KLM Royal Dutch Airlines*, [2002] 2 A.C. 628, ¶ 71 (H.L. 2002).

sitting in a seat for a prolonged period of time, *Margrave v. British Airways*, 643 F. Supp. 510, 511 (S.D.N.Y. 1986).

The facts here – aggravation of a pre-existing asthmatic condition by a normal and expected condition on the aircraft leading to a passenger's death – fit squarely into this line of cases. The full holding of *Saks* made clear that issues of crew negligence are not relevant because the "accident" inquiry focuses solely on the "nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury." *Saks*, 470 U.S. at 406-07. For these reasons, as a matter of law, Olympic Airways' failure to reassign Dr. Hanson's seat did not cause his death and the airline cannot be liable under the Warsaw Convention.

The courts below improperly weaved foreseeability and duty concepts into the *Saks* "accident" definition to support the conclusion that failure to comply with industry standards constitutes a sufficient "unexpected or unusual event or happening" to find an Article 17 accident. *Husain*, 316 F.3d at 837, Pet. App. at 14a-15a; *Husain*, 116 F. Supp. 2d at 1132-33, Pet. App. at 51a-52a. But *Saks* rejected a rationale similar to that accepted by the courts below. In *Saks*, the plaintiff alleged that her permanent deafness was caused by the airline's failure to properly maintain and operate the aircraft's pressurization system. *See Saks*, 470 U.S. at 394. Because there was no evidence of any malfunction, the Court addressed only the narrow issue of whether a plaintiff can meet its burden by showing that her injury was caused by the normal operation of the aircraft's pressurization system. As the Court stated, "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot

apply." *Id.* at 406. Here, as in *Saks*, the aircraft operated normally. Thus, regardless of whether Olympic Airways may have been negligent in failing to move Dr. Hanson, that failure did not cause his allergic or asthmatic reaction to the cigarette smoke,[11] and consequently Olympic Airways cannot be liable under the Convention.

In *Saks*, this Court provided important guidance to the lower courts when it stated:

> Any injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger. *Until Article 17 of the Warsaw Convention is changed by the signatories, it cannot be stretched to impose liability for injuries that are not caused by accidents.*

Id. (emphasis added). The court below failed to adhere to this guidance, and should therefore be reversed.

2. Two of this Court's holdings from important Warsaw Convention cases control the outcome in this case:

- The Warsaw Convention provides the exclusive basis for air carrier liability to a passenger claiming personal injury or death arising from international air transportation. *See Tseng*, 525 U.S. at 161.

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[11] Indeed, it is undisputed that Dr. Hanson's smoke allergy was pre-existing, and the courts below found that the allergy caused his death. *See Husain*, 116 F. Supp. 2d at 1130, Pet. App. at 47a (finding that "Dr. Hanson's death was the result of respiratory distress which was caused by an exacerbation of his asthmatic condition").

- For an air carrier to be held liable, there must be "an unexpected or unusual event or happening that is external to the passenger" that caused the passenger's personal injury or death. *Saks*, 470 U.S. at 405.

Here, the plaintiffs alleged no "accident" as that term is defined by *Saks* or otherwise commonly understood. Instead, they alleged that the air carrier *failed to prevent* the passenger's internal "reaction to the usual, normal, and expected operation of the aircraft" based upon the airline's knowledge that it was foreseeable that the passenger would have such an internal reaction. The plaintiffs further alleged, and the courts below found, that the airline failed to follow both industry standards[12] and its own company standards, and that these omissions constituted "accidents" under Article 17.

The courts below employed a modern, U.S.-developed, common law approach to liability, rather than adhering to the agreed international treaty-based liability regime framed in the Warsaw Convention. In doing so, they engaged in a form of creative jurisprudence that is alien to the Convention's goal of worldwide uniformity among diverse legal systems. Their holdings threaten to undermine the exclusivity and uniformity mandated by the

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[12] Apart from the fact that negligence-based liability is irrelevant in determining whether an "accident" has occurred under the Warsaw Convention, permitting an accident to be defined by reference to current industry standard will discourage airlines from undertaking efforts to protect passengers or to prevent foreseeable injuries. If airlines are going to be held liable to their passengers for failing to heed to a passenger's request to move seats based upon vague assertions of allergies, the standard in the industry will become simply to make no effort to do so.

Convention and to overrule this Court's decision in *Tseng*.

Both courts below focused on duty, industry standard of care, and foreseeability, all of which are negligence-based concepts developed by common law jurisprudence. Modern common law theories of liability that have developed in this country cannot be read into this international convention, which was fixed, for the sake of certainty and uniformity, when the negotiating States reached agreement on the Convention. *See, e.g., Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 544 & n.10 (1990) (rejecting the suggestion that liability could be imposed on an airline solely for an emotional injury in part because that injury has only become compensable in modern times). In *Tseng*, which held that the Warsaw Convention provides the exclusive remedy for a passenger injured during an international flight, this Court specifically held that the Convention operates exclusive of state law.[13] That exclusive liability scheme created by the Convention is fixed unless and until it is modified by the mutual agreement of the signatory nations. The courts below therefore erred in imposing this modern, extra-treaty legal construct on the Convention.

This Court has recognized that the cardinal purpose of the Warsaw Convention is to "achieve uniformity of rules governing claims arising from international air transportation." *Tseng*, 525 U.S. at 169-70; *See also Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 230 (1996); *Floyd*, 499 U.S. at 552. As explained in *Tseng*, the Convention balances the interest of the passenger seeking to recover damages for injuries or death against the

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[13] The Court reasoned that "[r]ecourse to local law . . . would undermine the uniform regulation of international carrier liability that the Warsaw Convention was designed to foster." *Tseng*, 525 U.S. at 161.

interest of the carrier seeking uniform, predictable liability rules.[14] Thus, carriers gain from the limitation of liability, but passengers benefit from the "clear presumption of liability, which eliminated the difficult task of proving fault on the part of the carrier."[15] *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1489 (D.C. Cir. 1991); *see also In re Air Disaster at Lockerbie, Scot. on Dec. 21, 1988*, 928 F.2d 1267, 1271 (2d Cir. 1991).

The focus of the courts below on the failure of Olympic Airways to change Dr. Hanson's seat and its failure to follow industry standards to satisfy the "accident"

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[14] *See Tseng*, 525 U.S. at 170. Before the Warsaw Convention was adopted, air carriers in civil law countries (the vast majority of the signatory States) were permitted contractually to disclaim liability for passenger injury or death. *See generally* SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, OCT. 4-12, 1929, WARSAW CONVENTION MINUTES (R. Horner & D. Legrez transl. 1975). The drafting history of the Convention therefore reflects the drafters' compromise with respect to passengers, between no liability and exposure to unlimited liability. *See id.* at 47-48.

[15] As Lord Hope of the British House of Lords recently explained:

> From the point of view of the passenger or the owner of baggage or cargo, the imposition of liability without proof of fault on the carrier and the nullification of provisions relieving him of liability or restricting the amount of his liability are very significant advantages. From the point of view of the carrier too however there are significant advantages in the system laid down by the Convention. A principal consequence of that system is the exposure of the carrier to liabilities without the freedom to contract out of them. But it defines those situations in which compensation is to be available, and it sets out the limits of liability and the conditions under which claims to establish liability, if disputed, are to be made. *A balance has been struck between these competing interests, in the interests of certainty and uniformity.*

Morris, [2002] 2 AC 628, ¶ 66 (emphasis added).

requirement was incorrect and contrary to the structure of the Convention. The question (or existence) of carrier fault simply is not relevant in the first instance in determining whether the liability presumption of Article 17 arises. The sole proper inquiry is into "the nature of the event which *caused* the injury," *Saks*, 470 U.S. at 407. Here, it was Dr. Hanson's own internal reaction to the normal conditions of this flight which caused the injury. The court's inquiry into the care taken by the air carrier to avert the alleged injury during the normal and expected operation of an international flight was improper and it was this inquiry alone that led it to impose liability.

The courts below essentially equated the term "accident" with "negligence," which is not what the United States agreed to in the Convention and does not fit within the definition given by this Court in *Saks*. In contrast, the Eleventh Circuit in *Krys v. Lufthansa German Airlines* got it right, noting that "[h]aving provided for a defense turning on the absence of negligence, we think it unlikely that the drafters intended that the initial 'accident' inquiry be resolved by reference to negligence." 119 F.3d 1515, 1522 (11th Cir. 1997). The decision from the Court of Appeals below accepting the plaintiffs' argument that "[b]ecause [the flight attendant's] conduct was negligent, it fits the definition of accident under Article 17," *Husain*, 316 F.3d at 836, Pet. App. at 12a, is therefore incorrect.[16]

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[16] *Husain*, 316 F.3d at 836, Pet. App. at 12a. The District Court also reached a similar incorrect conclusion by relying improperly on a negligence standard when it held that "[t]he negligent failure of the flight crew to appropriately serve the needs of an ailing passenger can be considered an 'accident' under the Convention." *Husain*, 116 F. Supp. 2d at 1131, Pet. App. at 50a.

In an earlier case (decided after the District Court's decision here

The leading pre-*Saks* case involving the proper definition of "accident" - which this Court cited with approval in *Saks* - is *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130 (3d Cir. 1984). There, the Third Circuit held that the airline's alleged aggravation of a pre-existing injury during the course of a normal flight was not an Article 17 "accident" despite the flight crew's refusal to aid the passenger. In *Abramson*, the passenger claimed - as the plaintiffs did here - that the refusal to aid him was "unusual and unexpected" and thus an Article 17 "accident." *Id.* at 132. The Third Circuit properly found that absent "proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17." *Id.* at 133.

Contrary to the instruction from this Court in *Saks* and the proper application of the definition of accident in *Krys* and *Abramson*, the courts below incorrectly shifted the focus of the "accident" requirement from an inquiry into the nature of the event that caused the injury (*i.e.*, inhalation of cigarette smoke on a smoking flight) to the care that the air carrier allegedly could have taken to avert the injury. This Court, however, made clear in *Saks* that the focus of the "accident" inquiry is into the nature of the event that caused the injury, and not the care taken by the airline to avert the injury. *See Saks*, 470 U.S. at 407. The "accident" standard that the courts below applied misconstrues the nature of the liability created by the Warsaw Convention by

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but before the Court of Appeals decision), the Ninth Circuit properly applied the Convention when it explained that the definition of "accident" makes "no mention of the carrier's motive or mental state whatsoever." *Carey v. United Airlines*, 255 F.3d 1044, 1048 (9th Cir. 2001). The holding of the Court of Appeals in this case conflicts with its own precedent.

improperly focusing the "accident" inquiry on reasonableness, alternatives, foreseeability, and industry standards. However, neither the Convention, *Saks*, *Krys*, nor *Abramson* permits a court to premise its inquiry into the "accident" based on a perception of the risk, reasonable alternatives to avoid the risk, or the expense of minimizing the risk.

In holding the airline liable for Dr. Hanson's death and ordering that the airline pay $1,400,000 in damages to his family, the courts below held that an airline's failure to prevent a passenger's internal reaction to a normal and lawful condition on a flight constitutes a compensable accident under the Warsaw Convention. The flight attendant's failure to move Dr. Hanson at his wife's request constitutes nothing more than an omission - the flight attendant did not *do* anything and there was no "event" or "happening." Under *Saks*, such an omission cannot be an Article 17 "accident." While a pure omission can *cause* an "accident," it cannot *be* the "accident." When an airline fails to do something that the plaintiff claims it should have done, such as reassign a passenger's seat, no "event" or "happening" has occurred. The evidence at trial established that nothing happened during this ordinary and unremarkable flight that involved the actions of anyone except for the passenger himself and his atypical reaction to a normal and otherwise unremarkable flight.

Quite simply, a failure to take action to prevent a passenger's internal reaction to a normal condition - whether known by the airline's employees or not - is not an "event" or "happening" and is therefore outside the scope of the *Saks* definition of an Article 17 accident. Neither court below made any finding that the ambient smoke in the passenger cabin was anything other than a "normal" and

"expected" condition on the flight. Under *Saks*, the presence of normal, expected conditions takes this case outside the scope of those that are compensable under the Warsaw Convention.[17]

Allowing a court to engage in a form of jurisprudence applied in the United States but not in all signatory States will lead directly to the result the Convention was intended to avoid, that is, the application throughout the world of numerous and diverse tests of liability based on the substantive law of the forum chosen by the plaintiff.[18] Neither the District Court nor the Court of Appeals, both part of the third branch of government, has the power to change unilaterally the Convention language agreed to by the Executive Branch and consented to by the Senate under Article II, Section 2 of the U.S. Constitution.[19]

Finally, the United States and other countries have drafted a new treaty to replace the Warsaw Convention that preserves the basic liability regime of the Warsaw

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[17] Plaintiffs presented no evidence at trial that anything happened in the course of the flight that adversely affected the performance or flight characteristics of the aircraft, that the systems affecting the passenger cabin environment were in any condition other than their normal working order, or that the aircraft and its flight crew did not comply with all applicable aviation regulations.

[18] Under the Warsaw system, it is the procedural law only, never the substantive law, that the forum court controls. *See* Warsaw Convention, art. 28(2) ("Questions of procedure shall be governed by the law of the court to which the case has been submitted.").

[19] This section of the U.S. Constitution grants the Executive, not district court or court of appeals judges, the "Power, by and with the Advice and Consent of the Senate, to make Treaties." U.S. Const. art. II, § 2.

system. This new agreement, known as the 1999 Montreal Convention,[20] is pending before the Senate for its advice and consent to ratification. It preserves without change the requirement of Article 17 that an "accident" occur before a passenger can recover from an air carrier for personal injury or death.[21] The preservation of this requirement, together with its uniform worldwide legal interpretation, was an essential ingredient in securing the agreement of parties to lift the Warsaw monetary liability limits. Upon its entry into force, the 1999 Montreal Convention will supersede the Warsaw Convention and will codify the airlines' contractual waivers of their liability limits.

As the Court in *Tseng* specifically made clear, "Postratification adjustments . . . are appropriately made by the treaty's signatories," not the courts. *Tseng*, 525 U.S. at 673 n.12. The drafters of the 1999 Montreal Convention have confirmed that the accident requirement as defined by *Saks* remains a necessary prerequisite for awarding damages for death or injury under the Warsaw Convention. The ATA urges the Court to reverse the efforts by the courts below to make improper postratification adjustments to the Warsaw Convention.

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[20] *See* Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, ICAO Doc. 9740, S. Treaty Doc. No. 106-45 ("1999 Montreal Convention"). The Senate Committee on Foreign Relations held a hearing just three weeks ago on the 1999 Montreal Convention. *See* United States Aviation Policy: The Montreal Convention and The Hague Protocol, Hearing on Aviation and Environment Treaties Before the Senate Comm. on Foreign Relations, 108th Cong. D.674 (June 17, 2003).

[21] 1999 Montreal Convention, art. 17.

CONCLUSION

For the foregoing reasons, the Air Transport Association of America, Inc. as *amicus curiae* urges the Court to reverse the decision of the United States Court of Appeals for the Ninth Circuit. This Court should hold as a matter of law that the occurrence of an "accident," which is a condition precedent to air carrier liability under Article 17 of the Warsaw Convention, is not satisfied when a passenger's pre-existing medical condition is aggravated by exposure to a normal condition in the aircraft cabin, even if the air carrier negligently fails to prevent the aggravation of the passenger's pre-existing medical condition.

Respectfully submitted,

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THE PROVISIONS OF THE REVISED WARSAW CONVENTION APPLICABLE TO THE UNITED STATES IN THE EVENT OF RATIFICATION OF MONTREAL PROTOCOL NO.4[1]

Excerpt from Senate Executive Report 105-20 (August 25, 1998)

CHAPTER I. SCOPE-DEFINITIONS

Article 1

1. This Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise. (W-Art. 1)

2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention. (H-Art. I)

3. Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the

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[1] Margin notes give the source of the provision (W = Warsaw Convention; H = The Hague Protocol).

parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State. (H-Art. I)

Article 2

1. This Convention shall apply to transportation performed by the State or by legal entities constituted under public law provided it falls within the conditions laid down in Article 1. (W-Art. 2)

2. In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations. (M4-Art. II)

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items. (M4-Art. II)

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I. PASSENGER TICKET

Article 3

1. In respect of the carriage of passengers a ticket shall be delivered containing:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. (H-Art. III)

2. The passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22. (H-Art. III)

SECTION II. BAGGAGE CHECK

Article 4

1. In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph 1, shall contain:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the effect that if the carriage involves an ultimate destination or stop in a country other than the

country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to baggage.

2. The baggage check shall constitute prima facie evidence of the registration of the baggage and of the conditions of the contract of carriage. The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph 1(c)) does not include the notice required by paragraph 1(c) of this Article, he shall not be entitled to avail himself of the provisions of Article 22, paragraph 2. (H-Art. IV)

SECTION III. DOCUMENTATION RELATING TO CARGO

Article 5

1. In respect of the carriage of cargo an air waybill shall be delivered.

2. Any other means which would preserve a record of the carriage to be performed may, with the consent of the consignor, be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.

3. The impossibility of using, at points of transit and destination, the other means which would preserve the record of the carriage referred to in paragraph 2 of this

Article does not entitle the carrier to refuse to accept the cargo for carriage. (M4-Art. III)

Article 6

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor. (M4-Art. III)

Article 7

When there is more than one package:

a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

b) the consignor has the right to require the carrier to deliver separate receipts when the other means referred to in paragraph 2 of Article 5 are used. (M4-Art. III)

Article 8

The air waybill and the receipt for the cargo shall contain:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and

c) an indication of the weight of the consignment. (M4-Art. III)

Article 9

Non-compliance with the provisions of Articles 5 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability. (M4-Art. III)

Article 10

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by him or on his behalf in the air waybill or furnished by him or on his behalf to the carrier for insertion in the receipt for the cargo or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 5.

2. The consignor shall indemnify the carrier against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on his behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by him, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on his behalf in the receipt for the cargo or in the record preserved by the other means referred to in paragraph 2 of Article 5. (M4-Art. III)

Article 11

1. The air waybill or the receipt for the cargo is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the receipt of the cargo relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the cargo. (M4-Art. III)

Article 12

1. Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

3. If the carrier obeys the orders of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the receipt for the cargo delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage

which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the receipt for the cargo.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition. (M4-Art. III)

Article 13

1. Except when the consignor has exercised his right under Article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to him, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage. (M4-Art. III)

Article 14

The consignor and the consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract of carriage. (M4-Art. III)

Article 15

1. Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the

mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the receipt for the cargo. (M4-Art. III)

Article 16

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, octroi or police before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, his servants, or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents. (M4-Art. III)

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. (W-Art. 17)

Article 18

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered baggage, if the occurrence which caused the damage so sustained took place during the carriage by air.

2. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon

condition only that the occurrence which caused the damage so sustained took place during the carriage by air.

3. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following:

a) inherent defect, quality or vice of that cargo;

b) defective packing of that cargo performed by a person other than the carrier or his servants or agents;

c) an act of war or an armed conflict;

d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

4. The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the baggage or cargo is in the charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

5. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. (M4-Art. IV)

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods. (W-Art. 19)

Article 20

In the carriage of passengers and baggage, and in the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures. (M4-Art. V)

Article 21

1. In the carriage of passengers and baggage, if the carrier proves that the damage was caused by or contributed to by the negligence of the person suffering the damage the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

2. In the carriage of cargo, if the carrier proves that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he derives his rights, the carrier shall be wholly or partly exonerated from his liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. (M4-Art. VI)

Article 22

1. In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability. (H-Art. XI)

2. a) In the carriage of registered baggage, the liability of the carrier is limited to the sum of two hundred and

fifty francs per kilogram, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum, not exceeding the declared sum, unless he proves that the sum is greater than the passenger's or consignor's actual interest in delivery at destination. (H-Art. XI; M4-Art. VII)

b) In the carriage of cargo, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case, the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the consignor's actual interest in delivery at destination. (M4-Art. VII)

c) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of the other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability. (H-Art. XI)

3. As regards objects of which the passenger takes charge himself the liability of the carrier is limited to five thousand francs per passenger. (H-Art. XI)

4. The limits prescribed in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later. (H-Art. XI)

5. The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment. (H-Art. XI)

6. The sums mentioned in terms of the Special Drawing Right in this Article shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of

a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that High Contracting Party.

Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 2(b) of Article 22 may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of two hundred and fifty monetary units per kilogramme. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. This sum may be converted into the national currency concerned in round figures. The conversion of this sum into the national currency shall be made according to the law of the State concerned. (M4-Art. VII)

Article 23

1. Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention. (W-Art. 23, designated as para. 1 by H-Art. XII)

2. Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried. (H-Art. XII)

Article 24

1. In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons

who have the right to bring suit and what are their respective rights.

2. In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability. (M4-Art. VIII)

Article 25

In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment. (M4-Art. IX)

Article 25A

1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22. (H-Art. XIV)

2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits. (H-Art. XIV)

3. In the carriage of passengers and baggage, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result. (M4-Art. X)

Article 26

1. Receipt by the person entitled to the delivery of baggage or goods without complaint shall be prima facie evidence that the same have been delivered in good condition and in accordance with the document of transportation. (W-Art. 26)

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have [has] been placed at his disposal. (H-Art. XV)

3. Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid. (W-Art. 26)

4. Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part. (W-Art. 26)

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate. (W-Art. 27)

Article 28

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

2. Questions of procedure shall be governed by the law of the court to which the case is submitted. (W-Art. 28)

Article 29

1. The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

2. The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted. (W-Art. 29)

Article 30

1. In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

2. In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee. (W-Art. 30)

Article 30A

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person. (M4-Art. XI)

CHAPTER IV. PROVISIONS RELATING TO COMBINED TRANSPORTATION

Article 31

1. In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of Article 1.

2. Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air. (W-Art. 31)

CHAPTER V. GENERAL AND FINAL PROVISIONS

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by

which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28. (W-Art. 32)

Article 33

Except as provided in paragraph 3 of Article 5, nothing in this Convention shall prevent the carrier either from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention. (M4-Art. XII)

Article 34

The provisions of Articles 3 to 8 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business. (M4-Art. XIII)

Article 35

The expression "days" when used in this convention means current days, not working days. (W-Art. 35)

Articles 36-40[2]

Article 40A

1. In Article 37, paragraph 2 and Article 40, paragraph 1, the expression High Contracting Party shall mean State. In all other cases, the expression High Contracting Party

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[2] Articles 36 to 40 govern participation in and withdrawal from the Convention. Montreal Protocol No. 4 would largely supersede these clauses for the United States and they are therefore omitted here.

shall mean a State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective.

2. For the purposes of the Convention the word territory means not only the metropolitan territory of a State but also all other territories for the foreign relations of which that State is responsible. (H-Art. XVII)

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this Convention to call for the assembling of a new international conference to consider any improvements which may be made in this Convention. To this end it will communicate with any Government of the French Republic which will take the necessary measures to make preparations for such conference. (W-Art. 41)